APPEAL NO. 93169

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp.l 1993) (1989 Act). On February 1, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues presented and agreed upon at the CCH were:

1.Whether claimant had an injury on or about (date of injury).

2.Whether an injury was reported to the employer within 30 days as required by the statute.

3.Whether the condition that caused lost time beginning October 20, 1992, was the result of the injury on or about (date of injury).

4.Whether claimant became disabled from working on October 20, 1992.

The hearing officer determined that the appellant, claimant, did not sustain an injury which arose out of and in the course and scope of her employment on (date of injury) and failed to notify the employer of the alleged injury within 30 days. Claimant contends that the findings are against the great weight and preponderance of the evidence and requests that we reverse the hearing officer's decision and render a decision in her favor. Respondent, carrier, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

Claimant testified she was employed in the pre-press department as a camera operator by (employer) on (date of injury) when she picked up a square box (cube) of chemicals. Claimant testified such a chemical cube weighs 30 to 50 pounds and that she had taken the cube from a shelf approximately five feet high and had carried the cube 20 feet to her work station. Claimant stated she had a sharp pain in her lower back, buttocks and left leg after she set the cube on the floor beside her work station. Claimant testified she orally reported her injury to her group leader, (Ms. Wa), and received permission from Ms. Wa to go to the doctor. Claimant testified she believed Ms. Wa was a supervisor in the absence of the regular supervisor. Claimant states she went to MediCenter where she saw (Dr. Bo) at 10:30 on (date of injury).

Claimant admitted she has had, and continues to have cramps and back pain from "female problems." Dr. Bo examined and treated claimant on January 24th and on a statement form records claimant complained of "lower back pain off & on x 3 wks. But has been worse past 2 days." Claimant missed half a day work on Friday, January 24th and returned to the doctor on Monday, January 27th where Dr. Bo, on a permission slip,

recorded claimant ". . . has an infection that she is being treated for. She should be able to return to work tomorrow." Dr. Bo diagnosed claimant's medical problem as lumbar strain with findings of spasms and tenderness at the 7 through 5 region of the lumbar area. Claimant returned to work on Tuesday, January 28th, and turned in doctor's excuses for the half day absence on January 24th and full day absence on January 27th. Claimant continued working, with only one day sick leave, until April 10, 1992 when claimant stated she was off from April 11, 1992 through June 29, 1992 to be at home with her children. On February 29, 1992 claimant signed a claim for health benefits for "muscle spasms" and stated her muscle spasms were not job related.

Claimant states she returned to work from her leave of absence on June 29th (although there is some record of a return on June 23rd) and worked with no personal sick leave until October 19, 1992 when claimant saw Dr. Be at MediCenter with complaints of back pain. X-rays were taken and claimant was referred next door to (Dr. K), a chiropractor. Dr. K put claimant on light duty, with "no lifting over 10 lb. for approximately 2 weeks. Patient will be re-evaluated. . . on a daily basis." On November 3, 1992, claimant requested a medical leave of absence from October 23, 1992 until January 19, 1993 with the provision that should claimant "fail to return to work on or before January 20, 1993. . . this will serve as a voluntary resignation." On October 30, 1992, (Dr. H) performed an MRI on claimant and stated there was a disc bulge at L5-S1 that "does not significantly incroach (sic) the adjacent nerve root, subarachnoid space or neuroforansina." The MRI was essentially negative. On December 10, 1992, claimant signed an information sheet for benefit from Planned Parenthood which indicated a "back injury 9-92."

Carrier called (Mr. G), who testified he was employer's production manager and identified (Ms. LW) as claimant's supervisor on (date of injury). Mr. G testified he first became aware of claimant's claim on October 29, 1992 when the doctor's office called and asked for workers' compensation authorization for an MRI and contending claimant had sustained a job injury on January 24th. Mr. G testified the group leaders, such as Ms. Wa, assign tasks but do not have supervisory functions.

Ms. LW testified she was claimant's supervisor on January 24th and that she saw and talked with claimant on a daily basis. She states she was present at work on (date of injury). Ms. LW testified at no time did claimant report a job injury to her and that she first heard about claimant's allegations from Mr. G on October 29th. She testified claimant does no heavy lifting because stock boys deliver supplies to the work stations.

Ms. Wa testified that she does not remember claimant telling her of a back injury in January 1992. In any event, Ms. Wa states, had she been told of a job-related injury by claimant, she would have referred the employee to Ms. LW or Mr. G. Ms. Wa further testified that she organized work and assigned work orders to other employees in the department but that she is not a comanager or supervisor and has no supervisory or

evaluation input or responsibilities. Ms. Wa states Ms. LW was present in her department on (date of injury).

The hearing officer found claimant had not sustained an on the job injury on (date of injury), had not reported the alleged injury to the employer within 30 days, was off work from and subsequent to October 20, 1992 for personal reasons not related to her employment and consequently did not have disability as defined by the 1989 Act. Claimant appeals stating ". . . there is no evidence to substantiate these findings and, in the alternative, there is insufficient evidence or the findings are against the great weight and preponderance of the evidence.

Claimant asserts both that there is "no evidence" to support the findings and in the alternative there is "insufficient evidence" to support the findings. In considering the "no evidence" challenge, only evidence favorable to the carrier, in this case, will be considered to determine if some evidence supports the decision that claimant did not sustain a compensable injury. If "some" evidence is found, all evidence will then be considered and weighed to see if it is sufficient to uphold the decision or if it is so deficient as to make the decision against the great weight and preponderance of the evidence. Mueller v. Charter Oak Medical Center, 533 S.W.2d 123 (Tex. App.-Tyler 1976, writ ref'd n.r.e.) and Texas Workers' Compensation Commission Appeal No. 91002, decided August 7, 1991. As there is clearly "some" evidence to support the hearing officer's determinations we will review the case on a sufficiency of the evidence standard.

An employee seeking workers' compensation benefits for a work related injury has the burden of proving that the injury occurred in the course and scope of employment. Reed v. Aetna Casualty & Surety Company, 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). Although the claimant testified regarding her injury lifting a chemical cube on (date of injury), Dr. Bo's records that the lower back pain has existed "off & on" for three weeks and had gotten worse the last two days. That the injured party is the only witness to an injury does not defeat a valid claim. When the claimant's testimony is that of an interested party, that testimony raises an issue of fact for the trier of fact, Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ), and the trier of fact has the responsibility to judge the credibility of the claimant and the weight to be given her testimony in light of the other testimony in the record. Burlesmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ).

Claimant, on appeal, is apparently claiming an aggravation of a preexisting condition. While we agree that the existence of a preexisting condition, in and of itself, does not negate a subsequent injury, claimant's theory on appeal however, now seems to be that somehow lifting, bending, stooping exacerbated some kind of preexisting condition. At the CCH, claimant presented the claim as a specific discrete injury which occurred around 8:30 a.m. on (date of injury), while claimant was carrying or moving a 30 pound chemical cube. Article

8308-1.03(27) defines injury as damage or harm to the physical structure of the body and includes occupational disease which in turn is defined in section 1.03(36) and includes repetitive trauma diseases. We would note, as discussed above, that the hearing officer is the trier of fact (Article 8308-6.34(e)). The hearing officer made findings of fact and conclusions of law based on a specific discrete injury theory rather than an occupational disease and the Appeals Panel can only consider the record developed at the CCH. Consequently, we will review the record for sufficiency of the evidence based on allegations of a specific incident occurring on the morning of (date of injury) and allegedly reported to Ms. Wa as a group leader.

It would appear that claimant's case will stand or fall based on Ms. Wa's testimony. Although claimant testified that she sustained a specific injury on the morning of January 24th, Dr. Bo first records that the pain has existed for three weeks and then on Monday, January 27th records that claimant is being treated for an infection. Ms. LW testified claimant told her it was a kidney infection. Claimant returned to work on January 28th and worked until October 20th with a break during April, May and June to stay home with her children. Carrier, through employer witnesses, denies that claimant ever mentioned an on-the-job accident, in spite of seeing her supervisor, Ms. LW daily, and offers evidence from the employer's health plan that claimant was denying a job-related injury and evidence from Planned Parenthood of a 9-92 injury. Ms. Wa testified that she does not remember claimant mentioning an on-the-job injury and if claimant had, Ms. Wa would have referred her to Ms. LW or Mr. G. The hearing officer obviously did not believe claimant injured herself on January 24th, or that she reported any such injury to Ms. Wa. There is sufficient evidence to support those determinations.

Claimant, in her appeal, on two occasions states that Ms. LW "testified she works a `bunch of women' and doesn't pay much attention to their moans and groans." We fail to find any testimony in the transcript to that effect. However, we do note there is an inconsistency in Ms. LW's testimony in that she states she spoke with claimant about going to the doctor some time between 11:00 a.m. and 1:00 p.m. on January 24th while the doctor's records reflect claimant was seen by Dr. Bo at 10:30 a.m. When presented with such conflicting evidence, the trier of fact may believe one witness and disbelieve others, and may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlmann, 722 S.W. 2d 694, 697 (Tex. 1986). The hearing officer saw and heard the testimony and observed the demeanor of the witnesses, including the claimant.

Because the findings and conclusions that claimant did not sustain a compensable injury on (date of injury) and did not report the alleged injury to Ms. Wa, are supported by sufficient evidence, they are dispositive of the issues in this case and no additional discussion is necessary as to whether Ms. Wa was in a supervisory position or whether claimant has disability. Where, as here, there is sufficient evidence to support the hearing officer's determinations, there is no sound basis to disturb his decision. Only if we were to

determine, which we do not in this case, that the determinations of the hearing officer were so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust would we be warranted in setting aside the hearing officer's decision. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.); In re King's Estate, 244 S.W.2 660 (Tex. 1951). Applying these standards of review, we affirm the hearing officer's findings that claimant did not sustain a compensable injury on (date of injury), that claimant did not report the alleged injury within the required 30 days after the date of the injury, and that claimant did not have disability because she did not have a compensable injury.

The decision of the hearing officer is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge